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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S REQUEST FOR ADMONITION REGARDING CLOSING ARGUMENT**

Defendant James Arthur Ray, by and through undersigned counsel, hereby requests that this Court admonish the State against potential prosecutorial misconduct during the State's closing argument. The prosecutor's statements in the Rule 20 briefing and oral argument give rise to concern that the State will make misrepresentations and other improper statements in closing. This request is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

"Misconduct by the prosecutor during closing arguments may be grounds for reversal because he is a public servant whose primary interest is in the pursuit of justice." *State v. Jones*, 197 Ariz. 290, 305 (2000); *State v. Eisenlord*, 137 Ariz. 385, 396 (App. 1983) ("[T]his court has held that the cumulative effect of improper statements made in closing argument mandates reversal."). A prosecutor risks mistrial or reversal where her "remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict." *Sullivan v. State*, 47 Ariz. 224, 238 (1936); *State v. Snowden*, 138 Ariz. 402, 406 (App. 1983) (same).

This Court has broad discretion to control trial proceedings to prevent or alleviate potential misconduct. *See, e.g., Pool v. Superior Court*, 139 Ariz. at 103–104 ("The trial judge is armed with both discretionary power and rules which he may used to control proceedings."). The Court should exercise that discretion here given the demonstrated risk that the State will (1) misstate the evidence, (2) engage in improper vouching, (3) makes statements that improperly shift the burden of proof; (4) make statements that violate the Rules of Evidence, particularly Rule 404's prohibition of propensity evidence; (5) make statements that violate pretrial rulings, specifically the Court's 404(b) ruling issued February 3, 2011.

1. The State May Not Make Erroneous Factual Representations Or Urge Inferences Not Supported By The Evidence.

A prosecutor's closing argument "must be based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence." *State v. Dumaine*, 162 Ariz. 392, 402 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 90 ¶ 12, 235 P.3d 240, 243 (2010). Although the closing argument "may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions," counsel may *not* urge inferences that are *not* supported by the evidence. *State v. Bible*, 175 Ariz. 549, 602 (Ariz. 1993). Moreover, it is

"impermissible" during closing argument for counsel to interject facts which are not in evidence. *Grant v. Arizona Public Service Co.*, 133 Ariz. 434, 41 (1982).[1]

The State's Response to Defendant's Rule 20 Motion for Judgment of Acquittal, and the prosecutor's remarks during oral argument on the motion, contain numerous factual misrepresentations that exceed the boundaries for closing argument set out in *State v. Bible*. The following examples are illustrative of the unsupported statements:

- Misstatement: The sweat lodge used in 2009, "a low wooden frame covered in blankets and tarps that entrapped the heat and allowed minimal air circulation, was the same sweat lodge Defendant had used for his event in 2008." State's Rule 20 Response, at 1:17–20.
    - Evidence: Testimony from Ted Mercer established that, although the "kiva" was the same, the rocks and wood were different. And there is no testimony from any witness with personal knowledge that the coverings were the same, that the coverings did not come into contact with foreign materials, or that any substances on the soil stayed the same between years.
- Misstatement: "Many witnesses testified how they were tired, hungry, exhausted, mentally weak and fully conditioned to follow Defendant's directions by the time they entered his final event." State's Rule 20 Response, at 2:23–25.
    - Evidence: Not a single witness testified that they were "conditioned" or "fully conditioned" to follow Mr. Ray's directions. The *only* person who made that assertion was Ms. Polk, in her opening statement. *See* Trial Transcript, 3/1/11, at 8:11–16 ("Many witnesses in this trial will testify that by the end of the week when they entered Mr. Ray's sweat lodge for the

[1] In addition, Arizona's Rules of Professional Conduct forbid an attorney from "assert[ing] or controvert[ing] an issue" unless the attorney has "a good faith basis in law and fact for doing so that is not frivolous." Ariz. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 3.1. And a prosecutor has a duty to "seek justice, not merely a conviction," and "to see that defendants receive a fair trial." *State v. Hughes*, 193 Ariz. 72, 80 (1998).

grand finale event, his heat endurance challenge, they were exhausted, mentally weak, and fully conditioned to follow Mr. Ray's instructions.").

- Misstatement: "The audio of Defendant's pre-sweat lodge briefing is uncontroverted evidence that Defendant knew participants would not rely on their own instincts as to the potential serious harm . . . ." State's Rule 20 Response, at 4:16–17.
    - Evidence: The content of the audio recording is uncontroverted, but the assertion that Mr. Ray "knew" participants would act in a certain way is, at best, highly disputed. The State has not proven Mr. Ray's knowledge.
- Misstatement: "Defendant intentionally induced heat stroke to take participants to the edge of death, to show them the altered experience of near-death." State's Rule 20 Response, at 5:12–14.
    - Evidence: The evidence is that Mr. Ray spoke of "altered states," which he described as including everything from meditation to falling in love. There is no evidence that Mr. Ray intended to induce heat stroke or to expose participants to near-death conditions. Such a statement by the prosecutor is unsupported by the evidence and grossly prejudicial and inflammatory.
- Misstatement: "All of the State's medical experts testified to a medical degree of certainty that the three victims died as a result of exposure to heat."
    - Evidence: *Both* of the Medical Examiners testified that they *cannot* say with a medical degree of certainty that the victims died as a result of exposure to heat. Dr. Mosley testified that he now has "doubts" about his original conclusions regarding Ms. Neuman's cause of death. Trial Transcript, 5/6/11, at 7:20–22. And he testified that he "cannot exclude organophosphates as a contributing cause or a cause of death." *Id.* at 8:12–16. Dr. Lyon testified he did not hold his conclusion that the cause of death was heat stroke to any degree of medical certainty. Trial Transcript, 3/31/11, at 142:14–18 ("MS. DO: And so, as you sit here, Dr. Lyon, can

you tell the jury whether you believe the cause of death in this case is heat stroke beyond a medical -- reasonable medical degree of certainty? A. No."). In addition, Dr. Cutshall, the ICU physician who treated Liz Neuman, explained that he suspected "acute ingestion," and had entered an admitting diagnosis of heat stroke because of "medical billing" requirements, which do not permit entry of a "nonbillable code." *See id.* at 201:13–203:12. Ultimately, Dr. Cutshall stated that he could not rule out organophosphate poisoning. *See id. at* 247:12–17 ("MS. DO: Now, given all these indications, Doctor, as you sit here before this jury, can you tell them with certainty that you can rule out organophosphates? A. I can't say I can rule it out with certainty. No.").[2]

- Misstatement: "Witnesses at trial testified that Defendant's conduct during his event was a gross deviation from the conduct of other sweat lodge facilitators. Witnesses testified that [Mr. Ray] . . . continued his ceremony in spite of the obvious distress of the other participants, including his knowledge that Liz Neuman was struggling and Kirby Brown was unconscious, without checking on their well-being." State's Rule 20 Response, at 7:12–19.
    - Evidence: No one testified that Mr. Ray's conduct was a gross deviation from any standard of conduct. This Court has already held that there is no applicable standard of care for sweat lodge facilitation. *See* Under Advisement Ruling on Defendant's Motion to Exclude Proposed Expert Testimony of Douglas Sundling, issued 5/25/11, at 2 ("[T]here is no recognized, special legal standard of care applicable to the facts of this case that is comparable to the standards applicable to cases involving physicians, coaches, and other professions or occupation. . . ."). In addition, during the testimony of Fawn Foster, the Defense objected to the

[2] Except where otherwise noted, transcript quotations in this motion are available as Exhibits to Defendant's Rule 20 motion.

suggestion that a standard of care existed, and the Court noted that it was aware of no standard of care. The State then denied attempting to establish a standard of care.[3] Nor could a witness have testified to an ultimate issue in the case. *See* Ariz. R. Evid. 704. Furthermore, no witness testified that Mr. Ray had knowledge that Liz Neuman and Kirby Brown were "struggling" or "unconscious." That assertion is unfounded and highly contested.

- Misstatement: "By round 4 of Defendant's event, the normal length of a sweat lodge ceremony conducted by a reasonable person, . . ."
    - Evidence: As noted above, there is no standard of care and no "normal length" of a sweat lodge ceremony. This Court's ruling on that point is the law of the case, and the State is not free to disregard it in closing argument.

The Court should admonish the State to omit these and other unsupported statements from its closing argument.

2. The State May Not Engage In Improper "Vouching."

The State may not make statements during closing argument that attempt to "place the prestige of the government behind [its] case." *State v. Leon*, 190 Ariz. 159, 162 (1997). This misconduct occurs not only when a prosecutor "vouches" for a particular witness, *see State v. Vincent*, 159 Ariz. 418, 423 (1989), but also when the prosecutor bolsters her case by emphasizing the government's role in the case against the defendant, *see Leon*, 190 Ariz. at 161–

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[3] "[MR. KELLY]: . . . The problem here and from a 403 analysis, I believe what the State of Arizona is trying to do is say on a prior occasion we only went three or four rounds. We only put five or six rocks. We had had a Native American who was conducting the sweat lodge, and no one got sick. That has marginal, if any; little, if any, probative value. And yet it's highly prejudicial because it implies this underlying theme of negligence --

THE COURT: That's what I'm saying. That would be setting somebody up as an expert, like there is some standard be -- standard as to how you run sweat lodges. ***There is not that I'm aware of.*** Ms. Polk, is that what you intend to do?

MS. POLK: No.

See Trial Transcript, 4/1/11, at 100:11–101:1 (emphasis added) (attached as Exhibit A).

62 (statements that the prosecutor was "representing the people" and that "when the police have charged or arrested an individual, the County Attorney's Office reviews to determine if there [are] sufficient grounds to charge" improperly attempted to place the prestige of the government behind the case).

During closing argument the State may not tell the jury that "we"—i.e., the State—"know" certain things to be true, as the State has often done in arguments to the Court. Such vouching suggests to the jury that certain evidence "carries with it the imprimatur of the Government," which "may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985). The Court should admonish the State to refrain from beginning sentences with "We know . . ." and from other improper vouching during its closing argument.

3. The State May Not Attempt To Shift the Burden Of Proof To Mr. Ray.

The Court has already expressed concerns with remarks by the State that attempt to shift the burden of proof to Mr. Ray, and has given a cautionary jury instruction accordingly. *See, e.g.*, Trial Transcript, 4/28/11, at 207:22–25 (THE COURT: Ms. Polk, what about the implication that the defense somehow has to tell the state what might be important, that implication? That's the burden shifting."); *see also* Jury Instruction, 4/29/11. The State must not be permitted to suggest that Mr. Ray failed to come forward with evidence of organophosphate poisoning or other evidence refuting the State's theory of causation, or that such "failure" is proof of his guilt.

4. The State May Not Refer To Any "Pattern" Of Misconduct By Mr. Ray.

The State has repeatedly argued that prior sweat lodge evidence demonstrates a "pattern" of misconduct by Mr. Ray. This theory—an alleged "pattern" of injuries inflicted by Mr. Ray, in which Mr. Ray himself is "the only common denominator"—is quintessential propensity evidence, barred by Rule 404(a). The State has already acknowledged that it is "trying" not to use the word pattern. *See* Trial Transcript, 5/10/11, at 151:16–19 (legal argument by Mr. Hughes during testimony of Dr. Dickson) (attached as Exhibit B). And the Court ruled at that time that "It would be best to not use the word 'pattern.'" *Id.* at 155:8–9. The State should be admonished not to assert a purported "pattern" in closing argument.

5. The State May Not Refer To Prior Sweat Lodge Ceremonies As Evidence of Mr. Ray's Knowledge.

Prior to trial, this Court ruled that alleged incidents at prior sweat lodge ceremonies are not admissible to prove Mr. Ray's knowledge. *See* Under Advisement Ruling on MIL No.1, 2/3/11. "[D]espite the large number of participants," the Court explained, "there is no substantial medical evidence that any of the persons attending the pre-2009 Spiritual Warrior events suffered a life-threatening condition. Therefore, with regard to manslaughter charges, evidence of the similarity of the way in which the sweat lodge and other ceremonies were conducted from year-to-year is not relevant and admissible on the issues of knowledge (i.e., conscious disregard of a known risk) and absence of mistake or accident." *See also id.* ("Without medical testimony or other substantial medical evidence to the contrary, evidence of the alleged disturbing physical and mental manifestations exhibited by pre-2009 sweat lodge participants is ***not sufficiently similar*** to the medical conditions associated with deaths in 2009 to show relevance to the issue of knowledge (conscious disregard of a substantial and unjustifiable risk) in a manslaughter case."). Yet at oral argument on the Rule 20 motion, the County Attorney argued:

> He chose to hold it in the sweat lodge at Angel Valley knowing he had held it there in 2008 and the problems he had had then. In the same structure, knowing he had held if it in a similar [structure] in Angel Valley in 2007 and the problems he had had there.

Draft Trial Transcript, 6/6/11, at 10–15 (attached as Exhibit C).

This argument directly violates the Court's ruling that alleged incidents at prior sweat lodge ceremonies cannot be considered as evidence of Mr. Ray's knowledge. The Court should remind the State that it must abide by the Court's February 3 ruling.

II. CONCLUSION

Given the documented risk of prosecutorial misconduct, Mr. Ray requests that the Court admonish the State regarding the permissible boundaries of arguments prior to closing.

DATED: June 13, 2011

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By: _____

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Copy of the foregoing delivered this 13 day of June, 2011, to:

Sheila Polk
Yavapai County Attorney
Prescott, Arizona 86301

by _____

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY TWENTY-SIX

APRIL 1, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

11:40:17AM some sweat lodges. That's not an issue, in my
11:40:20AM view.
11:40:20AM And I've been careful to listen to the
11:40:22AM questions.
11:40:22AM Because, Ms. Polk, I do agree if there is
11:40:25AM going to be any kind of saying this person is an
11:40:27AM expert on how sweat lodges can be operated with
11:40:31AM participants, I see that as a whole different issue
11:40:34AM because it's how they react in the sweat lodge,
11:40:36AM what their experience has been. Those things are
11:40:39AM relevant to an actual participant.
11:40:41AM But somebody else -- I mean, how those
11:40:44AM sweat lodges were conducted and comparing them, I
11:40:47AM didn't see you doing that. I didn't hear you go
11:40:50AM there. But that's one concern Mr. Kelly apparently
11:40:53AM has about her background.
11:40:54AM There is an issue about taking down the
11:40:56AM sweat lodge. That's just kind of come up. Why it
11:40:59AM was taken down, when it was taken down. And that
11:41:01AM information she's given is relevant to that.
11:41:05AM So I don't have any problem with any of
11:41:08AM the questions so far. I do -- there does need to
11:41:11AM be foundation, though, for what she actually knows
11:41:14AM about the sweat lodge.
11:41:15AM But if it's going to be that she was in

11:41:17AM 1 that structure and there is proof somehow that she
11:41:20AM 2 was, then I think that's relevant testimony.
11:41:24AM 3 Ms. Polk.
11:41:26AM 4 MR. KELLY: If I may, in regards to relevance.
11:41:30AM 5 I don't see how -- assuming that the state were to
11:41:37AM 6 later present the testimony of Ted Mercer, who
11:41:40AM 7 constructed this sweat lodge on October 8, and
11:41:42AM 8 assuming he constructed an earlier sweat lodge and
11:41:46AM 9 participated, he could say they were roughly
11:41:49AM 10 identical.
11:41:49AM 11 The problem here and from a 403 analysis,
11:41:56AM 12 I believe what the State of Arizona is trying to do
11:41:58AM 13 is say on a prior occasion we only went three or
11:42:02AM 14 four rounds. We only put five or six rocks. We
11:42:05AM 15 had had a Native American who was conducting the
11:42:08AM 16 sweat lodge, and no one got sick.
11:42:10AM 17 That has marginal, if any; little, if
11:42:12AM 18 any, probative value. And yet it's highly
11:42:15AM 19 prejudicial because it implies this underlying them
11:42:18AM 20 of negligence --
11:42:19AM 21 THE COURT: That's what I'm saying. That
11:42:20AM 22 would be setting somebody up as an expert, like
11:42:23AM 23 there is some standard be -- standard as to how you
11:42:27AM 24 run sweat lodges. There is not that I'm aware of.
11:42:30AM 25 Ms. Polk, is that what you intend to do?

MS. POLK: No.

THE COURT: I didn't think so. I didn't hear that.

MR. KELLY: I guess I don't understand.

MS. POLK: Again, to the issue of causation, which has -- this is not new. We've been talking about causation many, many weeks and months now.

This is a witness who was in a ceremony conducted in that same structure used in Mr. Ray's. How that ceremony was conducted is relevant because it goes to the weight of her testimony. It's a different ceremony. It's shorter, and there is significant differences in it. That's what's relevant to the issue of causation. This is the same structure.

And later in 2009 people get sick and they die in. I'm having her talk about the ceremony, how it was conducted, because that's relevant to this issue of causation. Not to have her testify as an expert. But if it's a shorter ceremony, if there is fewer rocks, then that goes to differences between the way the two ceremonies are conducted and directly to the issue of causation.

And one thing while we're here. This

witness is not part of the construction. And I would make an offer of proof that there will be a subsequent witness who will testify that it is the same structure and it's the same material and the same tarps. She knows that it's the same structure. But the details she's not part of.

So in terms of laying the foundation, I would ask for the Court's permission to have her testify about her experience in that structure. And then conditioned upon laying the foundation through a subsequent witness that it is, in fact, the same structure.

I believe she will say she believes it's the same structure. She's not going to be able to say she was part of the construction of it. Of course, the Hamiltons as well will say it's the same structure.

MR. KELLY: Judge, all my concerns, of course, are on the record. And I still don't get this link to causation the way it's been explained by the State of Arizona. What it's doing is improperly implying to the jury negligence on the part of Mr. Ray.

THE COURT: Well --

MR. KELLY: There is a significant 403

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FORTY-THREE

MAY 10, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

11:56:03AM whether or not people becoming ill under whatever
11:56:06AM circumstances at Mr. Ray's 2007 and 2008 sweat
11:56:11AM lodge ceremonies would bear on the cause of death
11:56:12AM or illnesses in 2009.
11:56:14AM Mr. Hughes has looped into that
11:56:17AM hypothetical a comparison of a pattern of Mr. Ray's
11:56:22AM sweat lodge ceremonies compared to nonJRI sweat
11:56:26AM lodge ceremonies. I think that's inappropriate.
11:56:28AM And the use of the word "pattern" repeatedly in
11:56:30AM this hypothetical essentially tells the jury that
11:56:32AM we're talking about propensity as opposed to
11:56:35AM physical, medical causation.
11:56:37AM THE COURT: I thought I heard "pattern" just
11:56:38AM once.
11:56:39AM Mr. Hughes.
11:56:39AM MR. HUGHES: Your Honor, I did use the word
11:56:41AM "pattern" once. I was trying not to use that word,
11:56:43AM but I did use it once. I didn't use it multiple
11:56:46AM times.
11:56:48AM Again, I don't believe this evidence
11:56:50AM suggests propensity. The questions are targeted
11:56:54AM towards the causation element. And I'm trying to
11:56:57AM ask targeted, leading -- essentially, leading,
11:57:02AM targeted questions on that causation issue.
11:57:04AM It's -- it's not pertaining to the propensity

issue. And I know we've been down that -- and discussed that multiple times in the past.

MS. DO: Your Honor, I'll correct myself. I think Mr. Hughes did use the word, pattern, once. But the import of the questions, multiple questions, was to compare a pattern of Mr. Ray's sweat lodge ceremonies to nonJRI. And I didn't understand that to be the Court's allowance of this evidence as to cause -- to physical, medical cause.

And, secondly, I think that the problem now for me with Mr. Hughes leading this witness into this area is that to the first three or four questions -- leading questions, he said no.

THE COURT: I realize that. So I don't --

MS. DO: Well, my concern --

THE COURT: -- I'm wondering why you're --

MS. DO: My concern --

THE COURT: -- bringing this up.

MS. DO: I'm sorry, Your Honor.

My concern is that the next question that will be leading -- the ultimate question that will be leading is -- you know -- do these events, these prior events, bear on the cause of death in 2009?

And given what the -- the witness has said to the specific questions, I don't see how

11:58:08AM he's going to be able to answer as yes. So my
11:58:11AM concern is that leading him into that area suggests
11:58:13AM to him that's the answer. And I think that based
11:58:17AM upon -- I'm sorry, Your Honor. One last thing --
11:58:19AM THE COURT: Oh, no. Don't -- I'm not --
11:58:21AM don't -- I'm just thinking.
11:58:21AM MS. DO: Thank you.
11:58:22AM THE COURT: Please, Ms. Do, continue.
11:58:24AM MS. DO: Thank you.
11:58:25AM Based upon the -- the testimony the Court
11:58:27AM has heard, again, this is now a witness who is
11:58:30AM testifying. And it doesn't sound to me that this
11:58:32AM expert is saying that this is information
11:58:34AM reasonably relied upon to opine cause of death
11:58:37AM in 2009. There is -- there is a logical disconnect
11:58:42AM here. And I think the witness is establishing
11:58:44AM that.
11:58:45AM THE COURT: And that -- that is a foundation
11:58:47AM objection in that -- the standard that Mr. Hughes
11:58:55AM hasn't gotten to that question either.
11:58:58AM MR. HUGHES: I haven't, Your Honor. I'm
11:58:59AM trying to establish foundation at this point.
11:59:02AM Again, I think it's appropriate to ask the witness
11:59:03AM to draw opinions from evidence that has been
11:59:07AM adduced at trial. And the evidence that has been

11:59:10AM adduced through the Hamiltons and the Mercers is not only about things observed in sweat lodges conducted by Mr. Ray but also about -- in 2007 and 2008, but the things that were not observed or were observed to the negative of other participants in other sweat lodges. And that's -- my questions are limited to that.

It's -- it's appropriate to ask a witness, an expert in particular, to draw the conclusion based on the testimony that's come in.

THE COURT: Ms. Do, anything else on this point?

MS. DO: Well, if the Court is -- is inclined to allow Mr. Hughes to continue this line of questioning, again, I don't think it's appropriate for Mr. Hughes to throw into the hypothetical nonJRI sweat lodge ceremonies.

Now -- now we're comparing -- essentially I -- that seems to me it does go to pattern and propensity and arguably inference of whether there is knowledge or notice.

This -- this is a medical doctor who is here to testify about medical cause, physical cause. And so the only thing that's relevant is what, if anything, has occurred through Mr. Ray's

12:00:11PM prior sweat lodge ceremonies and how that might --
12:00:14PM though I don't see it, how that might bear on the
12:00:17PM cause of death or cause of illnesses in 2009.
12:00:22PM So I just -- I have trouble seeing the
12:00:25PM connection, Your Honor. And I think that
12:00:27PM Mr. Hughes has gone beyond what I understood the
12:00:30PM Court to allow.
12:00:31PM THE COURT: It would be best to not use the
12:00:33PM word "pattern." I believe the questions are
12:00:36PM consistent with the rulings -- previous rulings.
12:00:44PM MS. DO: Your Honor, may I have one moment?
12:00:47PM THE COURT: Yes.
12:01:32PM MR. LI: Your Honor, just -- just -- because
12:01:34PM we want to preserve the record here. And if we
12:01:38PM could not -- we believe the pattern questions to be
12:01:41PM improper and to implicate potential mistrial
12:01:44PM issues.
12:01:45PM And if we could preserve the record on
12:01:48PM that particular issue as to whether or not -- you
12:01:53PM know -- that that particular question provoked a
12:01:55PM mistrial in light of all the various testimony
12:01:58PM here. And it's a question just like --
12:02:00PM THE COURT: So you're making that record right
12:02:02PM now.
12:02:02PM MR. LI: Either -- either -- yes, Your Honor.

53

signs ever distress and at least Bunn participant
Dawn Gordon testified she understood the sweat
lodge events could cause death, but that she
trusted the defendant and that he would keep her
and others safe Many testified they were in an
altered mental status, not thinking clearly that
they were weak, hot and ultimately in a self
survival ^ mode ^ mowed It is uncontested Your
Honor that the defendant controlled every single
aspect of that heat event He chose to hold it in
the sweat lodge at Angel Valley knowing he had held
it ^ there in ^ therein 2008 and the problems he
had had then In the same structure, knowing he
had held if it in a similar struck /TUR in Angel
Valley in 2007 and the problems he had had there
It's uncontested that the defendant controlled the
number of rounds It's uncontested that he
controlled the length of the round It's
uncontested that he controlled the entire
^ length ^ lent of the event it's uncontest /ED he
controlled the heat by controlling the number of
rocks brought in for each round It's uncontested
he controlled the hot steam by the amount of water
he poured on the rocks for each rounds It's
uncould not /SES tends he controlled how much heat

54

would /EGS /SKAEUP and how much fresh air could
enter the tents by control how long the flap was
open between each round and it's uncontested he
controlled when the flap would /EP and when it
would close He controlled when /PA*EURTD could
leave only between rounds and it is uncontested
essentially that the defendant controlled all
aspects of everything that occurred and that the
defendant intended for everything to occur
^ accept ^ except for death It's also
uncontested Your Honor that the defendant knew that
the participants were in distress. Several witness
as the court /TPHOESZ testified that they called
out or heard others call out with concern for the
well being of both Kirby Brown and Liz Neuman
Several witnesses testified that they heard the
defendant respond to both situations acknowledging
their statements of concern And in spite of this
/TKPHOL and the defendants knowledge of the growing
distress of many /PAEURT as participants as the
grounds progressed the defendant did not check on
the participants our stop the events and instead,
continued to create the /TAED Li /HAETD Continued
to create more deadly heat by bringing in more
heated rocks, more water, and creating more boiling

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steam in the already super health /-D environment
Apparently alarmed at the large number of stones
that were being called for by the defendant before
the fifth round, according to the best of Sean
Ronan, Megan Fredrickson, the defendants employee
warned him, quote James, these people are your
responsibility and nonetheless, and aware that
participants had passed out inside the sweat lodge
and aware that participants laid there unconscious,
the defendant continued to act. He continued to
introduce more heat More water and more steam
He continued to egg /TPHORT /PA*EURPTS to stay in
To ignore their bodies sign of /EUPL /PEPBT /-G
heat illness and continued to say as people left or
as people thought about leaving you are more than
that. You are more than your body
I want to address the issue of causation
Your Honor Because the state has proven yard that
the defendants conduct cause the death of the three
victims Some basic legal pre September about
causation First of all the state has to prove
legal causation cause in fact and you would not
have to be sent to prison In the discretion of
the court you could be placed on probation for up
to mat cause both We have to prove and we have

56

proven that but for Mr Ray's /KUBT, conduct the
resulting deaths would not have occurred We have
to prove and we have proven the approximate cause,
that in the natural and continue was sequence of
events, that the deaths would have occurred
produces the death and without which the deaths
would not have occurred In other words, without
Mr Ray's conduct, the deaths would not have
occurred Approximate cause requires the
difference between the result intended by the
defendant and the harm actually /SURD by the victim
is not so extraordinary that it would be unfair to
hold the defendant responsibility The court /ERT
heard testimony from the witnesses the defendant
intended for them to suffer altered mental status
and including unconsciousness when he told them you
might pass out, but that's okay We'll drag you
out The approximate cause /TK-S not exist if the
chain of natural events and cause either is broken
by a superseding intervening event that has to be
both unfor /AOE able by the defendant and without
the benefit of hindsight, may be described as
abnormal or extraordinary And intervening event
is not a superseding event interrupting causation,
if the defendant's negligence creates the very